Win Before You Walk In: Mastering Pre-Trial Tactics

Part 1: How to Settle Your Case Before Filing a Lawsuit

New York State
ACADEMY
OF TRIAL LAWYERS

MATERIALS BY
Andrew Smiley, Esq.

PRESENTED LIVE
ON ZOOM
JANUARY 7, 2026

JUSTICE
INTELLIGENCE GROUP

EVIDENCE COLLECTION

- GATHER WITNESS STATEMENTS TO SUPPORT INJURY CLAIMS
- OBTAIN SURVEILLANCE FOOTAGE FROM BUSINESSES, TRAFFIC CAMERAS, OR PRIVATE SOURCES
- DOCUMENT ACCIDENT SCENES WITH PHOTOS, VIDEOS, AND MEASUREMENTS
- LOCATE AND INTERVIEW RELUCTANT OR HARD-TO-FIND WITNESSES

BACKGROUND RESEARCH

- INVESTIGATE THE DEFENDANT'S HISTORY OF NEGLIGENCE OR PRIOR INCIDENTS
- CONDUCT BACKGROUND CHECKS

LEGAL SUPPORT

- PREPARE DETAILED INVESTIGATIVE REPORTS FOR ATTORNEYS TO USE IN LITIGATION
- TESTIFY IN COURT AS AN EXPERT WITNESS ON FINDINGS
- ASSIST ATTORNEYS IN BUILDING TIMELINES AND RECONSTRUCTING EVENTS

CASE STRATEGY ENHANCEMENT

- IDENTIFY INCONSISTENCIES IN OPPOSING PARTY'S STATEMENTS
- PROVIDE INSIGHTS THAT STRENGTHEN NEGOTIATION LEVERAGE DURING SETTLEMENT TALKS

SOLUTIONS FOR PERSONAL INJURY ATTORNEYS

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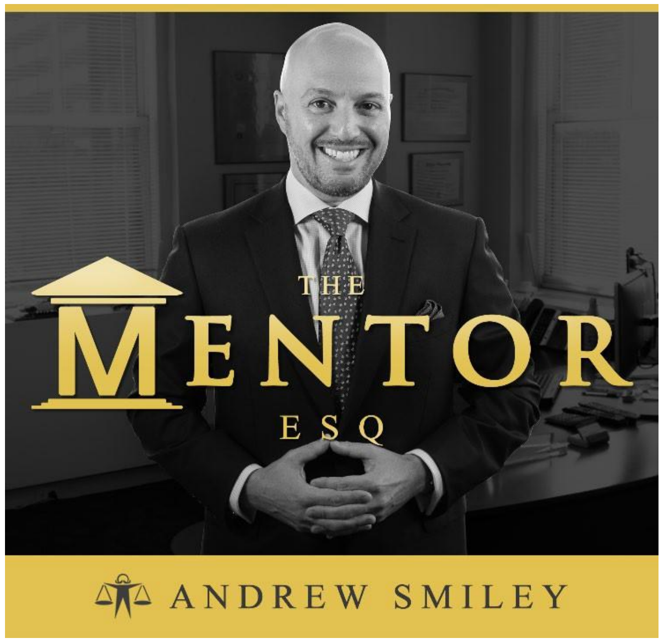

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CURRICULUM VITAE

Education:

·Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence for the Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

·Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:
· *Smiley & Smiley, LLP*
Managing Partner & Senior Trial Attorney, January 2001 - present
Associate, June 1996 - December 2000
Law Clerk, September 1993 - June 1996
Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation

· *Adjunct Clinical Instructor of Law - Brooklyn Law School*, Trial Advocacy Program (1998-2004)

· *The Mentor Esq. Podcast – A Podcast for Lawyers*

- Founder & Host (2019 – Present)

· *New York "Super Lawyer"*
2010, 2011,2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025

Bar Admissions:
- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United States District Court of Vermont

Organizations/Affiliations:

·New York State Academy of Trial Lawyers
-President (May 2017 – May 2018)
-President-Elect – (April 2016- May 2017)
-Vice President – 1st Dept. (July 2013-May 2016)
-Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)
- Master CLE Instructor (2020 – present)
- CLE Instructor (2013 – present)

·New York City Trial Lawyers Alliance
-Chairman of Board of Governors (July 2017 – July 2019)
-President (July 2015 – July 2017)
-Vice President (June 2013 – July 2015)
-Treasurer (June 2011 – June 2013)
-Secretary (June 2009- June 2011)
-Board of Directors (2000-present)

- Judicial Screening Committee, Kings County Democratic Party (2013)
- New York State Bar Association
- Brooklyn Bar Association
  Medical Malpractice Committee
  Supreme Courts Committee
- American Bar Association
- The American Association for Justice

- Brooklyn Law School Alumni Association
- National Order of Barristers
- Lime Rock Drivers Club
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors & Legal Counsel

<u>Authored Books</u>

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide,* 2022, The Mentor Esq. Handbook Series – Amazon Best Seller in Personal Injury Law

Smiley, Andrew J. *Successful Trial Skills – A Practical Guide to Jury Selection, Opening Statements, Direct & Cross Examinations and Closing Arguments*, 2024, The Mentor Esq. Handbook Series – Amazon #1 New Release in Trial Practice

<u>Continuing Legal Education (CLE) Presentations:</u>

(85) *Newly Admitted, Now What? The Skills You Didn't Learn in Law School – Part 2*, New York State Academy of Trial Lawyers, December 9, 2025

(84) *Newly Admitted, Now What? The Skills You Didn't Learn in Law School – Part 1*, New York State Academy of Trial Lawyers, December 8, 2025

(83) *Working with Vocational Experts in Personal Injury Litigation,* Lawline, July 24, 2025

(82) *Federal Court Confidence: Successfully Litigating Personal Injury Cases – Part 3: Motion Practice in Federal Court,* New York State Academy of Trial Lawyers, June 5, 2025

(81) *Federal Court Confidence: Successfully Litigating Personal Injury Cases – Part 2: Depositions in Federal Court,* New York State Academy of Trial Lawyers, May 1, 2025

(80) *Federal Court Confidence: Successfully Litigating Personal Injury Cases – Part 1: Overview of the Federal Court Process,* New York State Academy of Trial Lawyers, April 3, 2025

(79) *Who's on the Hook?- Part 4: Litigation and Insurance Issues in SUM Cases,* New York State Academy of Trial Lawyers, January 8, 2025

(78) *Who's on the Hook?- Part 3: Litigation and Insurance Issues in Premise Liability Cases,* New York State Academy of Trial Lawyers, December 4, 2024

(77) *Who's on the Hook?- Part 2: Litigation and Insurance Issues in Construction Accident Cases,* New York State Academy of Trial Lawyers, November 6, 2024

(76) *Who's on the Hook?- Part 1: Litigation and Insurance Issues in Ride-Share and Rental Car Accident Cases,* New York State Academy of Trial Lawyers, October 2, 2024

Continuing Legal Education (CLE) Presentations Continued:

(75) *Introducing Evidence and Impeaching Witnesses*, Office of The New York State Attorney General – Legal Education and Professional Development, September 26, 2024

(74) *Walking the Line: Settlement Negotiation Skills & Ethics,* New York State Academy of Trial Lawyers, July 9, 2024

(73) *Novel Negligence Cases – Part 2: How to Successfully Litigate Dram Shop Cases*, New York State Academy of Trial Lawyers, June 5, 2024

(72) *Working with Experts*, Office of The New York State Attorney General – Legal Education and Professional Development, April 2, 2024

(71) *Novel Negligence Cases – Part 3: How to Successfully Litigate Ski Accident Cases*, New York State Academy of Trial Lawyers, March 6, 2024

(70) *Novel Negligence Cases – Part 1: How to Successfully Litigate Personal Trainer and Gym Negligence Cases*, New York State Academy of Trial Lawyers, January 3, 2024

(69) *Litigation Back to Basics – Part 3: Introducing Evidence and Impeaching Witnesses*, New York State Academy of Trial Lawyers, December 6, 2023

(68) *Litigation Back to Basics – Part 2: Working With Experts*, New York State Academy of Trial Lawyers, November 1, 2023

(67) *Construction Site Injury Litigation: Pursuing or Defending Claims Against Site Owners, Contractors, and Other Third Parties,* Strafford CLE/BarBri, October 17, 2023

(66) *Litigation Back to Basics – Part 1: Preparing and Conducting Depositions*, New York State Academy of Trial Lawyers, October 4, 2023

(65) *Depositions*, Office of The New York State Attorney General – Legal Education and Professional Development, September 28, 2023

(64) *How to Litigate a Medical Malpractice Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, June 7, 2023

(63) *How to Litigate a Medical Malpractice Case – Part 5: Pre-Trial Preparation*, New York State Academy of Trial Lawyers, May 3, 2023

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

Continuing Legal Education (CLE) Presentations Continued:

(59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023

(58) *How to Litigate a Construction Accident Case – Part 4:* Motion Practice, New York State Academy of Trial Lawyers, December 7, 2022

(57) *Preparing for Depositions: Best Practices for Asking and Answering Questions,* Office of The New York State Attorney General, 2022 Legislature Program, December 6, 2022

(56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022

(55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022

(54) *Trial Series: Part 2 - Opening Statement Webinar,* Queens County Bar Association, September 22, 2022

(53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law,* New York State Academy of Trial Lawyers, September 7, 2022

(52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial,* New York State Academy of Trial Lawyers, July 6, 2022

(51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement,* New York State Academy of Trial Lawyers, June 2, 2022

(50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions,* New York State Academy of Trial Lawyers, May 4, 2022

(49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts,* New York State Academy of Trial Lawyers, April 6, 2022

(48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action,* New York State Academy of Trial Lawyers, March 2, 2022

(47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation,* New York State Academy of Trial Lawyers, February 4, 2022

(46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations,* New York State Academy of Trial Lawyers, January 5, 2022

(45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination,* New York State Academy of Trial Lawyers, December 1, 2021

(44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination,* New York State Academy of Trial Lawyers, November 3, 2021

<u>Continuing Legal Education (CLE) Presentations Continued</u>:

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements,* New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection,* New York State Academy of Trial Lawyers, September 10, 2021

(41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!,* New York State Academy of Trial Lawyers, July 7, 2021

(40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial,* New York State Academy of Trial Lawyers, June 2, 2021

(39) *How to Successfully Litigate a Personal Injury Case Series - Part 5:Pre-Trial Disclosures and Gearing up for Trial,* New York State Academy of Trial Lawyers, May 5, 2021

(38) *How to Successfully Litigate a Personal Injury Case Series - Part 4: Depositions,* New York State Academy of Trial Lawyers, April 7, 2021

(37) *How to Successfully Litigate a Personal Injury Case Series - Part 3: Your Adversary, the Preliminary Conference and Initial Discovery,* New York State Academy of Trial Lawyers, March 3, 2021

(36) *How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit,* New York State Academy of Trial Lawyers, February 3, 2021

(35) *How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File,* New York State Academy of Trial Lawyers, January 6, 2021

(34) *Brick by Brick: Building a Personal Injury Practice,* New York State Academy of Trial Lawyers, December 10, 2020

(33) *Working with Experts to Build Your Case,* New York State Academy of Trial Lawyers, October 8, 2020

(32) *Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020

(31) *Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court,* New York State Academy of Trial Lawyers, June 9, 2020

(30) *Crisis Management - The Corona Virus Pandemic,* The Mentor Esq. Podcast, April 9, 2020

(29) *Do You Have a Federal Tort Claims Act Case in Your Office,* New York State Academy of Trial Lawyers, December 10, 2019

(28) *Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts*, New York State Bar Association, September 9, 2019

Continuing Legal Education (CLE) Presentations Continued:

(27) *Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective*, The Defense Association of New York, March 12, 2019

(26) *Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019

(25) *Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives*, The Defense Association of New York, September 17, 2018

(24) *Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

(23) Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

(22) *Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA,* New York State Bar Association, October 11, 2015

(21) *Effectively Using Experts in Personal Injury Cases,* Lawline, October 8, 2015

(20) *Killer Cross Examination Strategies,* Clear Law Institute, April 21, 2015

(19) *Powerful Opening Statements,* Clear Law Institute, January 13, 2015

(18) *The Dram Shop Law: New York Liquor Liability,* Lawline.com, November 20, 2014

(17) *Killer Cross Examination Strategies,* Lawline.com, November 20, 2014

(16) *Trial Techniques: Tricks of the Trade Update,* Lawline.com, October 14, 2014

(15) *Personal Trainer Negligence Update,* Lawline.com, October 14, 2014

(14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014

(13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014

(12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013

(11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013

(10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012

Continuing Legal Education (CLE) Presentations Continued:

(9) *"You Had Me at Hello": Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012

(8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012

(7) *The Nuts and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011

(6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011

(5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011
Techniques: The Tricks of the Trade, Lawline.com, February 16, 2011

(4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011

(3) *Jury Selection 101, New York State Academy of Trial Lawyers*, December 14, 2010

(2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010

(1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

Television Appearances
Fox News Channel
-The O'Reilly Factor
-What's Happening Now with Martha McCallum
- America's News Room
- Fox & Friends
-Fox Business Channel
-Neil Cavuto
-Money with Melissa Francis
CNN -Anderson Cooper 360
ET – Entertainment Tonight
Bloomberg TV
Headline News
Tru TV
Court TV
The Morning Show with Mike and Juliet

Interests, Hobbies:

High-Performance Driving Events, Lime Rock Drivers Club, Porsche Enthusiast, Sim Racing, Tennis, Lego, Cooking, Yoga

PRE-SUIT SETTLEMENT CHECKLIST

The Mentor Esq. | Smiley & Smiley, LLP

CLIENT NAME: ______________________________ FILE #: ____________________

DATE OF INCIDENT: ______________________________ DATE OF INTAKE: ____________________

TYPE OF CASE: ______________________________ STATUTE OF LIMITATIONS: ____________________

I. CASE ASSESSMENT — Is This Case Right for Pre-Suit Settlement?

- ■ Case has clear liability (evaluate strength of case)
- ■ No significant liability disputes that require formal discovery
- ■ Insurance coverage appears adequate for injuries
- ■ Client treatment is substantially complete (or surgery is done)
- ■ Not an infant case (requires court order regardless)
- ■ Not a wrongful death case (requires court order regardless)
- ■ Claims adjuster is responsive and engaged
- ■ No complex coverage issues requiring litigation to resolve

→ If you cannot check most of these boxes, consider filing suit. Filing suit can activate settlement talks and get new claims representatives assigned.

II. INVESTIGATION COMPLETE

A. Documentation Obtained

- ■ Police Accident Report (PAR) obtained
- ■ Follow-up police report obtained (if applicable — FOIL/subpoena)
- ■ Incident report from property/business obtained
- ■ Photos of accident scene secured
- ■ Photos of client's injuries obtained
- ■ Video footage preserved and obtained (if available)
- ■ Preservation letters sent to all potential defendants
- ■ Event Data Recorder (EDR/CDR) data preserved (auto cases)

B. Witnesses

- ■ Client interview completed — thorough and documented
- ■ Witness statements obtained
- ■ Witness contact information recorded

C. Experts Consulted (If Needed)

- ■ Investigator dispatched to scene

- ■ Accident reconstructionist consulted (if applicable)
- ■ Engineering expert consulted (premises/products cases)
- ■ Medical expert consulted (med mal — Certificate of Merit)

  → *Your initial hard work in investigation can turn a loser on liability to a winner. Thorough investigation increases settlement value.*

III. MEDICAL RECORDS & TREATMENT STATUS

A. Records Obtained

- ■ All hospital records obtained
- ■ All treating physician records obtained
- ■ Physical therapy records obtained
- ■ Radiology/imaging reports obtained (MRI, CT, X-ray)
- ■ Pre-injury medical records obtained (if relevant)
- ■ Post-injury follow-up records obtained
- ■ Operative reports obtained (if surgery performed)
- ■ Medical records organized and reviewed

B. Treatment Status Assessment

- ■ Client has completed or substantially completed treatment
- ■ Future treatment needs assessed and documented
- ■ No pending surgeries that could significantly change value
- ■ Prognosis documented by treating physician

  → *Don't settle a case for non-surgical value when surgery may be needed. The difference could be $1,000,000+. Wait until you know the full extent of injuries.*

IV. INSURANCE COVERAGE EXPLORATION

A. All Tortfeasors Identified

- ■ Primary tortfeasor identified and coverage confirmed
- ■ Additional tortfeasors explored:
  - ■ Vehicle owner (separate from operator)?
  - ■ Property owner/managing agent?
  - ■ General contractor/subcontractors?
  - ■ Product manufacturer?
  - ■ Roadway design/municipality?
  - ■ Dram shop (bar/restaurant)?
  - ■ Maintenance company?

B. Coverage Confirmed

- ■ Bodily injury policy limits confirmed
- ■ Umbrella/excess coverage explored
- ■ SUM/UM coverage explored (auto cases)
- ■ No-fault/PIP benefits confirmed (auto cases)
- ■ Homeowner's policy explored (if applicable)
- ■ Commercial general liability policies identified
- ■ Workers' compensation lien amount identified

  → Exhaust ALL avenues of coverage. If policy is clearly less than injury value, get it tendered. Don't litigate a case that should settle for policy limits.

V. CASE VALUATION

- ■ Full value range determined based on:
  - ■ Experience and similar cases handled
  - ■ NY Jury Verdict Reporter search completed
  - ■ Lexis/Westlaw verdict and settlement search
  - ■ Appellate sustainable value research
  - ■ Consultation with colleagues

Valuation Factors Considered:

- ■ Severity and permanence of injuries
- ■ Age of client (life expectancy, future damages)
- ■ Pre-injury earnings and lost wages
- ■ Strength of liability
- ■ Venue (plaintiff-friendly or not)
- ■ Client likability as a witness
- ■ Available insurance coverage
- ■ Potential comparative fault

SETTLEMENT RANGE:	Low: $__________ | High: $__________

PRE-SUIT DISCOUNT RANGE: Low: $__________ | High: $__________

→ Bird in hand: A pre-suit settlement with a slight discount is often better than 3 years of litigation. But don't sell your client short.

VI. CLIENT COMMUNICATION & AUTHORITY

■ Client informed of pre-suit settlement strategy
■ Client understands the valuation range and factors
■ Client understands potential timeline savings
■ Client understands expense savings (may waive costs if settled pre-suit)
■ Client has provided authority to negotiate within range
■ Client understands no settlement without their consent
■ Settlement authority documented in writing

→ Keep your client INFORMED. Explain what you're doing so they're not wondering why you haven't filed suit yet. Information builds trust.

VII. DEMAND PACKAGE COMPONENTS

■ Claim letter / demand letter prepared
■ Complete medical records included
■ Medical bills summary prepared
■ Lost wage documentation included
■ Photos of injuries included
■ Photos of accident scene included
■ Police report included
■ Video footage provided (if available)
■ Witness statements included
■ Expert reports included (if obtained)
■ Verdict/settlement research summary (optional)

→ Don't hold back. Give everything to your adversary so they can properly evaluate the case. That's how cases get resolved.

VIII. CLAIMS ADJUSTER COMMUNICATION

- ■ Initial contact made with claims adjuster
- ■ Adjuster name and contact info recorded:

Adjuster Name:	___________________________________	Phone:	____________________
Email:	___________________________________	Claim #:	____________________

- ■ Demand package sent to adjuster
- ■ Adjuster has confirmed receipt of all records
- ■ Adjuster has indicated interest in pre-suit resolution
- ■ Follow-up schedule established

→ If the adjuster blows you off and doesn't respond, filing suit will get a lawyer involved and often a new claims representative. Use suit as a tool.

IX. ALTERNATIVE DISPUTE RESOLUTION OPTIONS

- ■ Direct negotiation attempted
- ■ Mediation discussed with adversary
- ■ Private arbitration discussed
- ■ High-low arbitration parameters considered

ADR OPTION SELECTED:	■ Direct ■ Mediation ■ Arbitration ■ High-Low
MEDIATOR/ARBITRATOR:	____
HIGH-LOW PARAMETERS:	Low: $__________ | High: $__________

→ ADR is the new way. Use all the tools in your toolbox. High-low arbitration saves your client money and gets resolution faster.

X. SPECIAL CASE CONSIDERATIONS

A. Infant Cases (Client Under 18)

- ■ Infant Compromise Order will be required regardless of pre-suit settlement
- ■ Consider filing suit to get case before judge for order
- ■ Use court oversight as leverage: "A judge may not agree with your value"

B. Wrongful Death Cases

- ■ Wrongful Death Compromise Order required (unless unrestricted letters)
- ■ Letters of Administration obtained or pending
- ■ Consider filing suit immediately in most death cases

C. Workers' Compensation Cases

- ■ Workers' comp lien amount confirmed in writing
- ■ Lien negotiation/reduction strategy developed

- ■ Section 11 bar analyzed (if employer negligence alleged)

D. Medicare/Medicaid Cases

- ■ Medicare Secondary Payer compliance considered
- ■ Medicare lien amount requested
- ■ Set-aside requirements evaluated (if applicable)

XI. READY TO PROCEED WITH PRE-SUIT SETTLEMENT

■	**Investigation is complete**
■	**All medical records obtained and treatment substantially complete**
■	**All insurance coverage exhausted and confirmed**
■	**Case properly valued with supporting research**
■	**Client informed and has provided settlement authority**
■	**Demand package prepared and ready to send**
■	**Claims adjuster is responsive and engaged**
■	**No special circumstances requiring court involvement**

OUTCOME TRACKING

DATE DEMAND SENT:	______________________	INITIAL OFFER:	$_________
DATE OF SETTLEMENT:	______________________	FINAL SETTLEMENT:	$_________

IF NO SETTLEMENT — DATE SUIT FILED: ______________________________

Instructions for an Infant's Compromise

COMPLIANCE WITH RULES AND STATUTES.

These rules are adopted in recognition of the equitable duty of this Court to consider infants to be wards of the court and to protect them as such. In order to safeguard the rights of infants, this Court will require strict adherence to its rules and all other applicable laws and rules. Failure to strictly comply may result in delay and/or denial. Please make certain before you file the required documents that, all of the affirmations and affidavits are consistent, that your application fully complies with and provides all information required by these rules as well as CPLR Article 12 (CPLR 1208), 22 NYCRR 202.67 and Judiciary Law § 474. Note that 22 NYCRR 202.5(e) requires the **redaction of all confidential personal information** in filed documents, including an infant's full name and birth date. Infant's initials and birth year should be used in filed documents.

If a structured settlement is proposed, the application must also comply with General Obligations Law Article 17, § 5-1701, *et. seq.* as well as Internal Revenue Code §§ 104 and 130.

THE FOLLOWING DOCUMENTS ARE REQUIRED FOR SUBMISSION TO THIS COURT IN AN INFANT'S COMPROMISE PROCEEDING:

1. An Order to Show Cause and proposed order;
2. Counsel's affirmation (see CPLR 1208[b], [e]-[f], 22 NYCRR 267.67 [a] as to disbursements*, and 22 NYCRR 267.67[d] as to OCA retainer number);

   * Disbursements for office overhead, including postage, overnight delivery, in-house copying, telephone calls, parking and local travel expenses are not allowed.
3. Parent's/Guardian's affidavit or petition verified by parent/guardian if no action was commenced/no complaint filed (see CPLR 1208 [a]; 22 NYCRR 202.67[b]);
4. Infant's affidavit including consent (if the infant is fourteen years of age or older);
5. Recent (within one year from the date of the petition/application) affidavit, affirmation or report from the infant's physician which must include the diagnosis, treatment and prognosis;
6. Supporting medical proof/records (see CPLR 1208[c]);
7. Other necessary and/or helpful exhibits;
8. For structured settlements, include:

   Structure settlement broker's affidavit;
   Proposed settlement agreement;
   Proposed assignment agreement;
   Proposed annuity contract;
   Proposed guaranty agreement;
   Accepted and Rejected structure proposals

THE PROPOSED ORDER.

This Court has provided form orders. Counsel is required to use one of these orders since they contain all of the decretal paragraphs required by this Court. Each proposed order can be adapted to fit the circumstances presented.

COUNSEL'S AFFIRMATION:

Counsel must provide an affirmation which demonstrates full compliance with and all information required by CPLR 1208 and 22 NYCRR 202.67 and contain sufficient details concerning the following:
Plaintiff/Petitioner's standing. Counsel's affirmation must state that parent has standing, as parent and natural guardian, or, if not a parent, demonstrate that plaintiff/petitioner is a person who is qualified and has standing to bring the application as authorized by CPLR 1207 (hereinafter "parent" shall be used to refer to a plaintiff with standing);

Counsel's reasons for recommending the settlement;

Recent and/or current complaints and condition of the infant;

Counsel and plaintiff/petitioner must obtain written proof of the total amount of the charges incurred for each doctor, medical provider and hospital in the treatment care of the infant and the amount remaining unpaid for such treatment and care (NYCRR 202.67);

All possible liens and claims. Counsel and plaintiff/petitioner must provide sufficient documentary proof of either the absence or existence of liens against the infant's settlement proceeds; obtain an itemized statement for any payments made by a lienor, provide sufficient details of the efforts made to resolve such liens, if any, claims for equitable or contractual subrogation or reimbursement by a private medical insurer or employee benefit plan such as ERISA must be identified and the reason for paying or not paying or compromising such claim must be set forth in detail.
NOTE , if lien information is not filed with the proposed Order to Show Cause for an infant's compromise, the Court will include a directive to request the lien information within a week of the Order to Show Cause and the return date will be for the filing of the lien letters;

Other related claims and possible conflicts;

Counsel fees and disbursements. Counsel must set forth all services rendered in support of its application for counsel fees. All disbursements claimed by counsel must be itemized especially those disbursements which counsel seeks to have reimbursed together with copies of invoices;
Retainer statement compliance (NYCRR Section 202.67(d));

A Fair and Reasonable Settlement. CPLR 1208 (b) (1) requires counsel to provide the *"reasons for recommending the settlement."* These *"reasons"* must be set forth in the supporting affirmations and affidavits. Moreover, this Court requires that counsel provide a detailed explanation as to why the proposed settlement is fair and reasonable. In that regard, counsel must address the issues of liability and damages and the infant's current complaints, if any. Note: Conclusory assertions (such as *"poor liability"*; or *"full recovery"*; or *"best interest of the child"*) without specification and supporting facts, will not be sufficient;

Recent and/or Current Complaints/Condition. The issue of the infant's current condition and any recent or current complaints must also be fully addressed in petitioner's affidavit, as well as in the current medical proof which is provided to the court in support of the application. If the infant does have recent or current complaints, the medical proof must provide a prognosis. Counsel is cautioned to make sufficient inquiry in advance so that the court and counsel are not surprised at the hearing concerning the infant's recent, intermittent or current complaints;

All Possible Liens. Note: 22 NYCRR 202.67(b) requires the court to make provisions for payment of all medical expenses and liens. The court is concerned that if this issue is not properly addressed, the plaintiff may be surprised and held accountable post settlement. It must be noted that a lien may arise by operation of law if public funds were used to pay for the medicals; and that the lien may have to be satisfied from the proceeds of the settlement regardless of the awareness of counsel or parent/petitioner; (**Counsel is responsible for submitting lien search requests** to HMS/New York State Medicaid Inspector General and the County Attorney in the County where the infant resides and where the infant resided at the time of the accident/incident).

Other Related Claims and Possible Conflicts. A full identification of all claims made by any person, including a parent or other family member, arising out of the same accident/incident must be provided in the parent's affidavit. The parent's affidavit must list all injuries sustained by that person and list all procedures/surgeries necessitated by the injury, so that with full disclosure, the court can determine if the proposed apportionment of the settlement proceeds is *"fair and reasonable."* [See also CPLR 1208 (a) (8)].

PLAINTIFF'S (PARENT)/PETITIONER'S AFFIDAVIT/VERIFIED PETITION.
Must demonstrate that plaintiff/petitioner is one of the persons authorized by CPLR 1207 to make said application, and it must comply with and contain all information required by CPLR 1208 and NYCRR 202.67, including details regarding:

Qualification and standing of plaintiff/petitioner to bring the application. CPLR 1207 provides that the application may be made by one of the following persons: a guardian of the property or guardian ad litem of an infant or a parent having legal custody or another person having legal custody or if infant is married, by an adult spouse residing with infant. Note: At times a parent may not qualify, for example, when custody has been removed by the Family Court. Also note, that even where a parent has lawful custody a problem can arise, for example, when the lawsuit is commenced by one parent on behalf of the ward and the compromise application is brought not by that parent, but by the other parent, who was not named as the natural guardian in the underlying claim or action. In such a situation, counsel must also provide, among other things, proof of the authority of the non-party parent to settle or discontinue the loss of services claim.

Plaintiff/petitioner's understanding of the proposed settlement. In addition to all of the above, a petitioner must acknowledge an awareness and understanding of all of the reasons given by counsel for recommending the settlement; as well as a full understanding of the proposed apportionment of the settlement proceeds.

Recent and/or current complaints, if any of the infant, all injuries, conditions and complaints, if any, made by the infant especially recent and/or current complaints, so that they can be fully addressed at the compromise hearing. At the hearing the following questions will be asked of the petitioner and the infant: Does the infant have any recent or current pain or limitations? When is the last time any pain or limitations were experienced? How often? Has the infant's physical or mental ability or range of motion, or ability to engage in any activities been affected?; and if so, what is the prognosis or plan for the future? If the Court finds that the infant's recent and/or recurrent complaints have not been adequately addressed, the application may be denied.

Medical Services, Expenses, Payments and Liens. CPLR 1208 (a) (4) requires that a parent/petitioner provide an itemization of such expenses; and subdivision (a) (7) provides that the affidavit/verified petition of the parent/petitioner must state whether reimbursement for medical expenses has been received from any source. 22 NYCRR 202.67(b) compels the court to make provision for payment thereof. Thus, parent/petitioner and counsel are cautioned not to be vague. The court must not be left with only mere speculation as to whether there are any unpaid bills or liens. For example, an unsupported statement that *"all medical expenses have been paid*", or that they have been *"paid by Medicaid"* will not suffice without documentary proof of payment. In addition, vague statements such as, "I have not been aware of any unpaid liens or bills," also will not suffice.

MEDICAL AFFIRMATION/REPORT

While an affirmation is not required, the court does mandate that a recent [within one year of the date of the petition] medical record or report be filed in support of the application. Such record, report or affirmation should provide all of the above information, especially as it relates to recent or current complaints and/or limitations of the infant. In addition, if there are any recent or current complaints and/or limitations, counsel should make sure that the medical proof provides a <u>prognosis and whether further medical treatment is required/recommended</u> so that the Court and the parent/petitioner can make a meaningful determination as to whether the proposed settlement is fair and reasonable. Sparse and conclusory medical reports or affirmations will not be acceptable.

OTHER NECESSARY AND/OR HELPFUL EXHIBITS

When necessary, the application should have as exhibits a copy of all documents (relating to liability and damages), which would assist the court in arriving at a determination. When such documents are included they should be appropriately identified in the supporting affidavits and affirmations, as well as separated by Exhibit tabs. Note: Additional documents will be necessary when a structured settlement is proposed (See below).

STRUCTURED SETTLEMENTS

Compliance with rules and statutes. These rules for a proposed structured settlement are supplemental to the above rules for the conventional settlement of claims for infants. Compliance with all applicable statutes and rules, including §§ 104 and 130 of the Internal Revenue Code and the New York State Structured Settlement Protection Act (General Obligations Law, Article 17, § 5-1701, *et. seq*.) are required.

Compliance with the Internal Revenue Code. One of the benefits of a structured settlement is that the full amount of the periodic payments received as physical injury damages is excludable from the claimant 's income by law. By comparison, a claimant receiving damages in the form of a lump sum must pay tax on the subsequent earnings from investing that lump sum. The Internal Revenue Code, in essence, allows settlement funds to be *"invested"* in an annuity and grow tax free (U.S. Internal Revenue Code §§104 and 130) (hereinafter the "Code".) However, it must be noted that the Code does not (without adverse tax consequences) permit a plaintiff to receive (or even constructively receive) settlement funds and then invest same in an annuity. Such a transaction would result in taxable income. By comparison, in the case of a structured settlement, the plaintiff and the defense agree to settle the physical injury claim in exchange for the defendant's promise to make a stream of periodic payments to the plaintiff. Under § 130 of the Code, the defendant or its liability insurance carrier then assigns its periodic payment obligation to an affiliate of a financially strong life insurance company. The assignment company agrees to receive an assignment of defendant's obligation to pay and then acquires an annuity from the life insurer to fund the periodic payments to the plaintiff. Under the Code, the full amount of these periodic payments (including the appreciation in value between the cost of the annuity and the total benefits paid) is tax-free to the plaintiff. In other words, the Code allows a defendant or its liability insurance carrier to use the same settlement proceeds to purchase an annuity and, then assign all payments including the growth thereon, to the plaintiff tax free. Therefore, both the settlement proceeds which are used to purchase the annuity, and the interest earned and paid via that annuity, are tax excludable.

For structured settlements - other required exhibits. When a structured settlement is proposed the following additional exhibits are required to be submitted with the application: (a) the affidavit of the Structured Settlement Broker; (b) the proposed settlement agreement; (c) the proposed assignment agreement; (d) the proposed annuity contract; (e) the proposed guaranty agreement; and (f) accepted structure (annuity) proposal and at least two rejected/alternative structure (annuity) proposals for the same cost and payout terms as the accepted proposal.

The proposed order for a structured settlement. Counsel must use one of the court's two form orders for a structured settlement. The form orders (simple and complex), which can be adapted to fit the circumstances presented, comport with Internal Revenue Code requirements.

Supporting documents and additional requirements. In addition to the requirements and documents described above for a traditional compromise application, the application for a structured settlement must also include and be supported by:

Counsel's affirmation (additional requirements). In addition to compliance with all other requirements for an ordinary compromise application, counsel for the plaintiff/petitioner, in support of a structured settlement must demonstrate "due diligence" in the selection of an annuity and a structured settlement broker and demonstrate that the plaintiff has been provided with the disclosure required by General Obligations Law § 5-1702 and § 5-1701 and copies of all of the above described proposed implementing structured settlement documents, as well as copies of the alternative/rejected and/or other competitive structure proposals from other annuity providers or from other structured settlement brokers, which were considered and rejected.

Parent/Petitioner's affidavit/verified petition must, among other things, acknowledge receipt of a copy of all of the above documents as well as a copy of counsel's affirmation in support of the proposed structured settlement; and parent/petitioner must acknowledge that all of the above was fully explained by counsel. Parent/Petitioner must further acknowledge receipt of all of the "initial disclosure" required by General Obligations Law § 5-1702, including the advice "to obtain independent professional advice relating to the legal, tax and financial implications of the settlement, including any adverse consequences." It should be noted that: "'Independent professional advice' means advice of an attorney, certified public accountant, actuary or other licensed professional adviser: who is engaged by a claimant or payee to render advice concerning the legal, tax and financial implications of a structured settlement or a transfer of structured settlement payment rights who is not in any manner affiliated with or compensated by the defendant in such settlement or the transferee of such transfer, and whose compensation for rendering such advice is not affected by whether a settlement or transfer occurs or does not occur." It must be further noted that for the purchase of an annuity (as distinguished from a sale or transfer thereof) a structure broker (whether selected by a plaintiff or a defendant) cannot qualify as an "independent professional adviser" under the above definition. Unless plaintiff receives a prior waiver upon good cause shown, plaintiff is required by this court's rules to obtain a competing proposal from a structure broker who is selected by the plaintiff and who is independent of the defendant and defendant's liability insurance carrier.

Affidavit of the Structured Settlement Broker. This court's rules require that an application for approval of a proposed structured settlement must be supported by an affidavit provided by a structure broker. In addition, that affidavit must conform to, and contain all representations and warranties that are set forth in the form affidavit. In the annuity field the bargaining agents are structured settlement specialists, and are usually referred to as structure brokers. Most defendants and/or their liability insurance companies have their own list of preferred structure brokers and preferred annuity issuers (life insurance companies). In addition, an annuity issuer will generally sell an annuity only through a structure broker that is appointed as an agent for such issuer. The vast majority of structure brokers, however, operate independently, and are not affiliated with any liability insurance company or annuity issuer. Furthermore, most structure brokers have agency relationships with multiple annuity issuers. The structured settlement application must be supported by an affidavit provided by the broker who places the annuity. The affidavit must, among other things, include: (a) a representation that the cost to purchase the proposed annuity was arrived at after a survey of the market of annuity providers in order to confirm and obtain the best value (price/quality) for same; (b) a full description of all the other annuity plans considered in addition to the one being recommended; and (c) all other warrantees, assurances and affirmations which are set forth in the form sample broker's affidavit. The following proposed documents, which will implement the recommended structured settlement, must be annexed as exhibits to the application and referred to in the brokers affidavit:

(a) Proposed Settlement Agreement, (b) Proposed Assignment Agreement, (c) Proposed Annuity Contract, (d) Proposed Guaranty Agreement, and (e) Rejected and/or Alternative Proposals

Due diligence and shopping for the best deal.
This court's rules require counsel for plaintiff, in his supporting affirmation to set forth and explain the efforts made to provide the infant-plaintiff with the best and least costly annuity. When conducting such "due diligence", counsel for infant-plaintiff should consider the following observations: (a) The Cost of the Annuity. While a fixed annuity is a contractual obligation rather than a traditional investment product, its future payout, and thus its rate of return, is affected mostly by the interest rates prevailing at the time of purchase. Despite the fact that annuity issuers periodically publish a schedule of rates, which set forth the cost to buy various future periodic payments, other variables affect the ultimate quote. First, rates between carriers may differ and, in any event, the published rates for each carrier are periodically adjusted relative to prevailing interest

rates. Second, the cost to purchase an annuity may be affected by the sex and life expectancy of the infant-plaintiff. Third, market place competition, rivalry and circumstances, which effect each annuity issuer, may also play a part in the annuity's return. When lifetime benefits are part of the proposed annuity, one unknown variable is infant-plaintiff's real life expectancy. For example, when payments which terminate at death are included in the proposed structure, and the infant-plaintiff, due to some injury or condition, has a shorter life expectancy than normal (and is thus given a "rated age"), the cost of the annuity may be less because the annuity issuer may anticipate making fewer payments. In such cases, although the offered annuity may have larger projected payout (if infant-plaintiff lives to a normal life expectancy), the annuity issuer's actuary "calculates" that the actual payout will be truncated by those "payments" which terminate upon death. In any event, as with mortgage rates, market forces and competition between issuers plays a role in the proposed cost of the annuity.

Independence of the structure broker. As noted above, the Internal Revenue Code, in essence, prohibits the direct purchase of an annuity by the plaintiff from the settlement funds. The Code mandates (in order to achieve tax excludability) that the claim be settled in exchange for the defendant or its carrier, with a preference in the selection of a structure broker. It should be noted that, although such a defendant selected broker has no fiduciary relationship with or obligation to the plaintiff, this lack of fiduciary obligation does not mean that such a broker cannot provide the best possible annuity advice and plan. In any event, nothing in the Tax Code precludes a plaintiff, from selecting and receiving advice from a structure broker who can act as a fiduciary for plaintiff and who is independent of the settling defendant and its liability insurance carrier. Indeed the recent experience in structured settlements has been that in serious physical injury cases, most often both parties are receiving advice from their own structured settlement brokers. As stated above, in many states the involvement of a broker selected by plaintiff is the accepted norm.

Unless a waiver is obtained upon good cause shown, the court's rules require, among other things, that the plaintiff obtain annuity advice from a structure broker that is independent of the defendant and its liability insurance carrier. This court's chief goal is to make certain that a settling infant is being provided with an annuity which is not only personally designed to meet the infant's needs, but also the best value available from a quality and cost evaluation. Although, it is not the purpose of these rules to imply that these goals cannot be achieved by a broker selected by a defendant, plaintiff is required by these rules to obtain advice from an independent plaintiff -selected broker if for no other reason but to introduce competition and market forces to the process. Thus, both brokers are required by these rules to survey the annuity market, and the application must provide an explanation why the proposed annuity represents the best value and is most suitable for this claimant. Due diligence in the selection of an independent structure broker is required in order to minimize the exposure of the plaintiff to abuses. Since the sale of a structured settlement may undermine the goal of the court to provide long term financial security to an injured settling party, counsel is advised that when doing due diligence in the selection of a broker, counsel should refrain from engaging the services of any structured settlement broker or company which has an affiliation with factoring companies. This is not meant to imply that, when an annuitant seeks to sell and transfer an annuity, a broker cannot qualify as a "licensed professional adviser", in accordance with § 5-1701(e) of the General Obligations Law nor is it meant to imply that such broker cannot provide good advice on how the annuitant can maximize the purchase price and not fall victim to a predatory factoring company. However, these services, should be provided at the request of the annuitant. In contrast, it would not seem appropriate for a structured settlement broker to provide the names of its client annuitants to such factoring companies for solicitation purposes; and it would certainly seem unethical for a structured settlement broker to receive a referral fee or any form of compensation from such a company. It must be noted that the "structure broker's affidavit" which is required by this court's rules must contain a representation that said broker does not have any such relationship with a factoring company. In any event, as stated above, it is not uncommon for costs of an annuity quoted by different annuity issuers, for the identical proposed annuity, to differ by more than 10%. When considerable sums are involved, 10% can be a very considerable savings to a plaintiff; and hopefully the competition between said brokers will result in a benefit for the plaintiff.

Compensation for the Broker. A structure broker is paid a one time commission of 4% for services rendered in connection with the selection and purchase of an annuity. This commission is paid by the annuity issuer. In theory this commission is not deducted from the settlement proceeds, but this cost is taken into consideration by the annuity issuer when it makes an annuity proposal. But, unlike many other types of investment vehicles there are no ongoing management, advisory, or administrative fees under a structured settlement. This can represent a significant cost savings over the decades of pay-out to a permanently disabled infant or minor plaintiff.

In any event, the issue of compensation and/or commissions for structure brokers must be addressed by counsel in the affirmation supporting the application. When more than one broker is involved, a dispute may arise as to which broker is entitled to the commission. Usually these disputes are resolved amicably with a commission sharing agreement. There are times when an amicable agreement cannot be achieved. In such instances the issue should be brought to the court's attention.

Guaranteed Payments. Counsel must be aware of, and not confuse the various forms of guarantees which are available and should be provided to a settling plaintiff/annuitant. There are three distinct guarantees. The "guaranteed" payments mentioned in the annuity contract and in the form orders which have been provided by this court, refer to that portion of periodic payments which will not terminate upon the death of infant/impaired person. Upon death, these "guaranteed" payments will be made to the estate of the infant/impaired person, or to the designated beneficiary of said person. These "guaranteed payments" are not to be confused with the guaranty of the annuity This guarantor company will guarantee the obligation of the assignee company to fulfill its obligation to make the future periodic payments in accordance with the annuity contract. Neither of these guarantees should be confused with the additional guaranty provided by the Life Insurance Company Guaranty Corporation under New York Insurance Law, Article 77. Under NY Insurance Law, Article 77, the Life Insurance Company Guaranty Corporation of New York provides $500,000 of protection with respect to an annuity in the event an annuity issuer becomes insolvent if the annuity issuer is licensed in New York and the plaintiff is a New York resident. In view of this, where the amount structured is more than $500,000, it may be prudent, but not required by law, to purchase annuities from more than one annuity issuer in order to keep the cost of each annuity below $500,000. The court is informed, however, that purchasing more than one annuity generally results in lower payments to the plaintiff. In any event, if the proposed annuity is to cost more than the above $500,000 maximum guaranteed by Article 77, both counsel and the structure broker must justify any proposed investment in an annuity which does not take full advantage of that added protection.

Lock-In Quotes and Notices. Plaintiff's counsel should avoid placing the court in a"catch 22" by locking in an annuity quote before submitting a structured settlement application for approval.

Unless the "lock in quote" acknowledges that it is subject to court approval, counsel must seek court approval before agreeing to a lock-in quote or notice. In any event, the said proposal should be brought to the court's attention expeditiously and before there is any change in prevailing interest rates. The court might consider imposing a penalty or sanction on those who, by violation of this rule, cause an infant to be unable to timely survey the market and obtain the annuity that represents the best value available for the particular plaintiff.

The Court's Rules and Forms

The proposed order in a structured settlement (simple) is designed for settlements where there is only one defendant (and its insurer) participating in the settlement and in the funding of the purchase of the annuity. If there is a different number of defendants, or more than one annuity is being purchased, the form must be modified accordingly; or the alternate form order (for complex settlements), should be used.

Before completion and submission of the application to settle a claim or action of an infant, counsel is cautioned to read the court's rules and to use the court's forms.

You will be required to serve a copy of the proposed structured settlement order on all defendants, insurance carriers and the appropriate Department of Social Services with a notice of settlement so that they will have an opportunity to be heard and object before being bound by its terms.

1. Preamble (Whereas) Clause

The terms of the settlement and other relevant information and requirements are outlined in the "Whereas" clauses. Note: This form complies with the requirements of the Internal Revenue Code and explains in its opening "Whereas" clauses, the significant difference between the "Total Settlement Payout" and the "Total Settlement Cost." Decretal Paragraph 1 has been specifically designed to comply with Internal Revenue Code requirements and should not be modified, (except however, to conform it to the specific periodic payments proposed in this application). Note, that when all future periodic payments are guaranteed, the amount set forth in the Whereas Clauses for "future periodic payments" and for "guaranteed periodic payments" will obviously be identical. However, if any of the future periodic payments will terminate upon death, the above amounts will be different. In any event, the whereas clauses may be modified accordingly.

2. All information set forth in the proposed order must be supported by underlying affidavits and affirmations as well as in the required exhibits. The proposed implementing structured settlement documents must be appended as exhibits to the application. These exhibits must identify all the necessary parties thereto as well as the annuity payout being proposed.

3. A structured settlement plan will be approved by the court after a hearing has been conducted. In most instances defendants insist that a structure plan be provided by a structure broker that is selected by defendant and/or its insurer. The Court requires that plaintiff's counsel retain a structure broker before discussing a structured settlement with the defendants, Both brokers can be compensated by a splitting of the annuity commission so there is no cost to the plaintiff or the attorney. If there is a dispute regarding commissions, request a hearing and request all necessary persons to be present.

4. The application to settle the claim must be supported by an affidavit by the structure broker whose structure plan is recommended to the court by plaintiff's counsel to be best for the infant/impaired person. This affidavit must conform to the form affidavit provided by this court.

5. Modify the form to comport with the proposed periodic payments which are described in the underlying documents, but do not otherwise modify the format since this paragraph was designed to comply with Internal Revenue Code requirements.

6. The "guaranteed" payments mentioned in this paragraph (as well as in the preamble "Whereas" clauses) refer to that part of periodic payments that will not terminate upon the death of the infant. Upon death, these "guaranteed" payments will be made to the fiduciary of the estate of the infant or to the designated beneficiary of said person. The "guarantee" mentioned in this paragraph is not to be confused with the guaranty which is provided by a "guarantor" company which will guarantee the obligation of the assignee company to make all of the future periodic payments. Nor should the guarantee mentioned in decretal paragraph 1 be confused with the additional guaranty provided under New York Insurance Law, Article 77.

Under New York Insurance Law Article 77, the Life Insurance Company Guaranty Corporation of New York provides $500,000 of protection with respect to an annuity in the event an annuity issuer becomes insolvent if the annuity issuer is licensed in New York and the plaintiff is a New York resident. See NYS Ins. Dept. O.G.C. Opinion 95-65 (9/24/95); See also N.Y.S. Ins. Dept. O.G.C. Opinion 5-1-96 (May 1, 1996), General Counsel Opinion 2-20-2003 (February 20, 2003). In view of this, where the amount structured is more than $500,000, it is prudent, but not required by law, to purchase annuities from more than one issuer to keep the cost of each annuity below $500,000. The court is aware, however, that purchasing more than one annuity generally results in lower payments to the plaintiff.

7. At the end of decretal paragraph No. 1, insert the name of the "payee." Here you should insert the name the infant plaintiff individually if payments commence on or after infant's 18th birthday. If payments commence before the 18th birthday or if payments are to an impaired person, provisions must be made for payments to the parent and natural guardian together with a Bank Officer; or to a guardian appointed pursuant to Article 81 of the Mental Health Law. In cases where an infant is receiving or may in the future receive, needs based governmental benefits, such as Medicaid or Supplemental Security income, Counsel should consider making provision for, and the order should provide for, the creation of a supplemental needs trust to preserve eligibility for such benefits, in which event the trust should be named as the payee in this paragraph.

8. There is a paragraph that sets forth the up-front money to be paid by defendants to cover the costs for plaintiff's counsel fees, disbursements, liens, claims and up front money to the plaintiff, if any. If other up-front money must be added, the form should be modified accordingly. There is also a paragraph which provides for the payment by defendant to fund the purchase of an annuity which will provide the future periodic payments. If this defendant is purchasing more than one annuity, then an additional subparagraph should be added for each payment toward an annuity.

9. The defendant (or its insurer), the "assignor", usually assigns the obligation to make the periodic payments to an "assignee" company, which is usually a "shell affiliate" of the annuity issuer.

That "assignee" company will then purchase the annuity contract from the annuity issuer.

10. The "annuity issuer" must be licensed to do business in the State of New York, in order for the annuity to be protected by the Life Insurance Company Guaranty Corporation of New York discussed above, and it should have an A.M. Best Company rating of no less than A++ or A+, which are the two highest ratings. The ratings of the proposed annuity issuer must be described in the broker's affidavit and must be supported by an appropriate exhibit attached thereto.

11. The "Settlement Agreement" and the "Assignment Agreement" will provide among other things, that the defendant (or its insurer) will assign the obligation to make the future periodic payments to an assignment company which is usually an affiliate of the annuity insurer. The assignment company (the "assignee") and the life insurance company (the "annuity issuer") must be identified, and its A.M. Best Company rating must be set forth.

12. The Court's Rules for a structured settlement require a copy of each of the proposed agreements to be submitted as exhibits to the structured settlement broker's affidavit, which is submitted in support of the application to settle the claim or action. There is no standard form of "settlement agreement." However, there are several forms of assignment agreements generally used in structured settlements. The plaintiff should request that the form known as the Uniform Qualified Assignment, Release and Pledge Agreement be used, <u>since it grants the plaintiff a security interest in the annuity</u>. Most annuity issuers will use such a form, if requested. If the annuity issuer does not offer a security interest, then the "Uniform Qualified Assignment and Release Agreement" must be used, <u>and the plaintiff will be a general, unsecured creditor of the Assignee</u>. **Where the annuity is for a sum greater than $500,000, the Court requires a provision granting infant a security interest in the annuity.** Please note, that the order requires, among other things that, after all of the documents have been signed, a copy of each must be provided to plaintiff by plaintiff's counsel and proof of service of same must be filed with the Clerk of the Court or via NYSCEF as the case may be.

13. The name of the "guarantor" company must be inserted. The obligations of the "assignee" company to make the periodic payments are guaranteed by the annuity issuer or a substantial affiliated company unless the assignee is a substantial company.

14. **Prior to the hearing, you will be required to serve a copy of the proposed structured settlement order on all defendants and insurance carriers and the appropriate Department of Social Services with a notice of settlement so that they will have an opportunity to object before being bound by its terms**.

15. The order will be signed on the "settlement" date which may be the hearing date, if no issue or objection has been raised by the defendant or the insurance carriers or the appropriate Department of Social Services involved in the transaction.

16. Counsel should carefully read and implement the remainder of the decretal paragraphs after the order has been signed.

GUIDELINES FOR SUBMITTING WRONGFUL DEATH COMPROMISE ORDERS

In the interests of judicial expediency, applications to compromise infant and wrongful death actions **should not be brought by** Notice of Motion, Notice of Petition or Order to Show Cause. Applications filed via the New York State Courts Electronic Filing System (NYSCEF) are to be commenced by the filing of a **Wrongful Death Compromise Order or Compromise Order (Proposed)**. Supporting documents are to be uploaded separately.

The Supreme Court, although it has concurrent jurisdiction with the Surrogate's Court, will **ONLY** approve the total amount of the settlement, the attorney's fees and the disbursements. The distribution of the remaining funds is referred to the Surrogate. Any language regarding distributions of money presented to Supreme Court is improper and shall be stricken.

SUBMISSIONS SHOULD INCLUDE THE FOLLOWING:

1) **Proposed Order** - The Order should provide that the settlement funds be held in an interest bearing escrow account pending further order of the Surrogate. The Order should further state that all attorneys fees approved by the court for the prosecution of the action for wrongful act, neglect or default, inclusive of all disbursements, shall be immediately payable from the escrow account upon submission to the trial court proof of filing of a petition for allocation and distribution in the Surrogate's Court on behalf of the decedent's estate.

A sample order is available upon request by calling or emailing: 516-493-3049 or 10JDNComp@nycourts.gov. This Sample Order is a basic Order containing necessary boiler plate language. Your case may require some additional language for special situations.

2) **Administrator/Executor/Executrix Petition** - see checklist

3) **Attorney's Affirmation** - see checklist

4) **Offer letter** - from Defendant or their insurance carrier confirming the settlement amount. If there is more than one defendant paying, a letter is required from each defendant or insurance carrier.

5) **Letters of Testamentary/Administration from Surrogate's Court**

Please note, there is a $45.00 filing fee for a Wrongful Death Compromise

FAILURE TO COMPLY WITH THE ABOVE GUIDELINES MAY RESULT IN A DELAY IN PROCESSING THE PAPERS OR REJECTION OF THE PAPERS.

****WRONGFUL DEATH COMPROMISE****
<u>CHECKLIST FOR ADMINISTRATOR/EXECUTOR/EXECUTRIX PETITION</u>:

1. ( ) Full name of Administrator/Executor/Executrix
   ( ) Residence of Administrator/Executor/Executrix
   ( ) Relationship of named Administrator/Executor/Executrix to decedent
   ( ) Appointment date by the Surrogate's Court

2. ( ) Full name of decedent
   ( ) Date of decedent's death
   ( ) Last known residence of decedent

3. ( ) Full name of surviving spouse if other than Administrator/Executor/Executrix
   ( ) Full names and dates of birth for each minor child
   ( ) If any surviving adult children, so state

4. ( ) Complete, specific and concise account of <u>ALL</u> circumstances and facts giving rise to the instant action (time, date, location, happening, etc...)

5. ( ) The exact terms and proposed distribution of the settlement proceeds and Administrator/Executor/Executrix's approval of both.

6. ( ) Statement as to whether any liens, claims, assignments or encumbrances against decedent, decedent's estate or the proceeds of settlement exist.

7. ( ) Statement as to status of decedent's medical bills (outstanding, paid).

8. ( ) Statement that no previous application has been made for the relief sought herein.

****Please note: CPLR 2106, effective 1/5/2024, Affirmation of Truth Statement:**

I affirm this _____ day of _____________, 20____, under the penalties of perjury under the laws of New York which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in court of law.

****WRONGFUL DEATH COMPROMISE****

CHECKLIST FOR ATTORNEY'S AFFIRMATION:

1. ( ) The specific facts and circumstances of occurrence giving rise to the claim
   ( ) The terms of retainer, date retainer filed and Judicial Conference/O.C.A. number assigned.

2. ( ) Full, comprehensive statement as to exact reasons why attorney feels instant action should be settled.
   ( ) Statement that counsel, neither directly nor indirectly, has become concerned in the settlement at the instance of any opposing or adverse party, not received or expects to receive any compensation from such party.
   ( ) Statement as to whether or not counsel now represents any other person asserting a claim arising from the same occurrence (include status of Administrator/ Executor/ Executrix's derivative claim, if any).
   ( ) Statement that no previous application has been made for relief sought herein.

3. ( ) Statement of services rendered by counsel.

4. ( ) List disbursements and if waived, so state.

New York Consolidated Laws, Judiciary Law - JUD § 475. Attorney's lien in action, special or other proceeding

Current as of January 01, 2024 | Updated by Findlaw Staff

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

New York Consolidated Laws, Judiciary Law - JUD § 475-a. Notice of lien

Current as of January 01, 2024 | Updated by Findlaw Staff

If prior to the commencement of an action, arbitration, mediation or a form of alternative dispute resolution, or a special or other proceeding, an attorney serves a notice of lien upon the person or persons against whom his or her client has or may have a claim or cause of action, the attorney has a lien upon the claim or cause of action from the time such notice is given, which attaches to a verdict, report, determination, decision, award, settlement or final order in his or her client's favor of any court, arbitral tribunal or of any state, municipal or federal department, except a department of labor, and to any money or property which may be recovered on account of such claim or cause of action in whatever hands they may come; and the lien cannot be affected by any settlement between the parties after such notice of lien is given. The notice shall, (1) be served by either personal service or registered mail; (2) be in writing; (3) state that the relationship of attorney and client has been established, the nature of the claim or cause of action, and that the attorney claims a lien on such claim or cause of action; (4) be signed by the client, or by a person on his or her behalf whose relationship is shown, and which signature shall also be witnessed by a disinterested person whose address shall also be given; and (5) be signed by the attorney. A lien obtained under this section shall otherwise have the same effect and be enforced in the same manner as a lien obtained under section four hundred seventy-five of this article.

cms.gov

Reimbursing Medicare | CMS

6–7 minutes

Medicare's Demand Letter

In general, CMS issues the demand letter directly to:

- The Medicare beneficiary when the beneficiary has obtained a settlement, judgment, award or other payment.
- The liability insurer (including a self-insured entity), no-fault insurer, or workers' compensation (WC) entity when that insurer or WC entity has ongoing responsibility for medicals (ORM).
- For ORM, there may be multiple recoveries to account for the period of ORM, which means that CMS may issue more than one demand letter.

When Medicare is notified of a settlement, judgment, award, or other payment, including ORM, the recovery contractor will perform a search of Medicare paid claims history. When the most recent search is completed and related claims are identified, the recovery contractor will issue a demand letter advising the debtor of the amount of money owed to the Medicare program and how to resolve the debt by repayment. The demand letter also includes information on administrative appeal rights.

For demands issued directly to beneficiaries, Medicare will take the beneficiary's reasonable procurement costs (e.g., attorney fees and expenses) into consideration when determining its demand amount. The formula used to decide how much the amount of reduction should be may be found by clicking the 42 CFR 411.37 link.

For more information on the beneficiary recovery process, click the Medicare's Recovery Process link.

For more information on the insurer recovery process, click the Insurer NGHP Recovery link.

Assessment of Interest and Failure to Respond

Interest accrues from the date of the demand letter, but is only assessed if the debt is not repaid or otherwise resolved within the time period specified in the recovery demand letter. Interest is due and payable for each full 30-day period the debt remains unresolved; payments are applied to interest first and then to the principal. Interest is assessed on unpaid debts even if a debtor is pursuing an appeal or a beneficiary is requesting a waiver of recovery; the only way to avoid the interest assessment is to repay the demanded amount within the specified time frame. If the waiver of recovery or appeal is granted, the debtor will receive a refund.

Failure to respond within the specified time frame may result in the initiation of additional recovery procedures, including the referral of the debt to the Department of Justice for legal action and/or the Department of the Treasury for further collection actions.

Right to Appeal

It is important to note that the individual or entity that receives the demand letter seeking repayment directly from that individual or entity is able to request an appeal. This means that if the demand letter is directed to the beneficiary, the beneficiary has the right to appeal. If the demand letter is directed to the liability insurer, no-fault insurer or WC entity, that entity has the right to appeal. If an individual or entity receives a courtesy copy of a demand letter, that individual or entity does not have the right to appeal. Debtors have the right to appeal Medicare's demand if the debtor believes the amount or existence of the debt is in error. The appeal must be filed no later than 120 days from the date the demand letter is received.

To file an appeal, send a letter explaining why the amount or existence of the debt is incorrect with applicable supporting documentation. The letter and documentation should be submitted to the return mailing address indicated on the demand letter. Once the request for appeal is received, a decision will be made indicating whether the demand amount is correct. A letter will be sent that explains the reasons for the decision. The letter will also explain the steps that need to be taken to appeal that decision if it is less than fully favorable.

Note: When an insurer/WC entity appeals a demand, the beneficiary will receive a letter that explains that the insurer/WC entity has submitted an appeal. Insurer/WC entity debtors may only appeal demands issued on or after April 28, 2015.

The insurer/WC entity's recovery agent can request an appeal for the insurer/WC entity if the insurer/WC entity has submitted an authorization, such as a Letter of Authority, for the recovery agent. Please see the *Recovery Agent Authorization Model Language* document which can be accessed by clicking the Insurer NGHP Recovery link.

Waiver of Recovery

The beneficiary has the right to request that the Medicare program waive recovery of the demand amount owed in full or in part. The right to request a waiver of recovery is separate from the right to appeal the demand letter, and both a waiver of recovery and an appeal may be requested at the same time. The Medicare program may waive recovery of the amount owed if the following conditions are met:

- The beneficiary is not at fault for Medicare making conditional payments, and;
- Paying back the money would cause financial hardship or would be unfair for some other reason.

If it is believed that both of these conditions apply, a letter should be sent to the BCRC that explains the reasons. When a waiver of recovery is requested, the BCRC will send the *SSA 632 Request for Waiver* form asking for more specific information about the beneficiary's income, assets, expenses, and the reasons why waiver of recovery should be granted. If the BCRC is unable to grant the request for a waiver of recovery, the BCRC will send a letter that explains the reason(s) for the decision and the steps to be followed to appeal that decision if it is less than fully favorable.

Note: The waiver of recovery provisions do not apply when the demand letter is issued directly to the insurer or WC entity. See Section 1870 of the Social Security Act (42 U.S.C. 1395gg).

Department of Social Services
Human Resources Administration
Department of Homeless Services
Department of Social Services
Accountability Office

INVESTIGATION, REVENUE AND ENFORCEMENT ADMINISTRATION
DIVISION OF LIENS AND RECOVERY
375 Pearl Street, 21st Floor
New York, NY 10038
Phone: (844) 449 3444 Fax: (844) 449-3445
Email: liensrecovery@hra.nyc.gov

LIENS & RECOVERY FACT SHEET

WHY AM I RECEIVING THIS LETTER?

The Department of Social Services (DSS) has been told that you or your child were injured in an accident. DSS has also been told that you or your attorney have asked the person or company responsible for your injuries for money to help make you whole. When you ask the person or company for money, the Department of Social Services is required to also ask them for money to repay the medical bills (medical assistance or Medicaid) and money (cash assistance) DSS paid on your behalf. This is called a lien.

HOW CAN I FIND OUT WHAT DSS IS OWED?

The New York City Department of Social Services, Division of Liens and Recovery is the unit that figures out how much DSS is owed. DSS, along with the New York State Office of the Medicaid Inspector General (OMIG), work to collect Medicaid and Cash Assistance liens. All requests or questions should be sent to the Division of Liens and Recovery. They can be reached at (212) 274-5892.

DEFINITIONS

LIEN: A hold on any money agreed to be paid or might be paid by the responsible person or company to you to help make you whole. DSS figures out how much the lien is by adding up all cash assistance and injury-related Medical care paid on your behalf from the date of the accident through the current date. (N.Y.S. SSL§104-b).

UPDATED LIEN AMOUNT: Sometimes you or your attorney may want to know how much is owed to help you work out how much money the responsible person or company will pay you. You or your attorney may ask for an "updated lien," which is the amount DSS is owed through the date of the letter.

FINAL LIEN AMOUNT: Once you or your attorney and the responsible person have agreed to a sum of money they will pay, you or your attorney **must**: 1. get in touch with DSS, 2. tell us how much you have agreed to, and 3. ask for the "final lien." This is the final amount DSS is owed, and your attorney cannot give you any money until they have agreed to pay DSS for the lien.

PRELIMINARY LIEN: If you or your attorney got a letter saying that there is a "preliminary lien" that letter notifies you or your attorney that you have received Medicaid benefits from DSS after the accident date. You or your attorney should get in touch with DSS and ask for an "updated lien."

CLAIM: If the amount you receive from the responsible person is a lot, DSS asks you to pay back all the cash assistance provided to you and your family for the previous ten years. This is called a Cash Assistance Claim (N.Y.S. SSL §104).

HOW TO SEND DSS A LIEN REQUEST

To **expedite** requests for **UPDATED** and **FINAL** liens, submit your request on the internet at the website:

http://www1.nyc.gov/site/hra/help/program-integrity-liens-form.page

You or your attorney can also **fax the request form to (844) 449-3445.**

Giving us the following information will allow DSS to calculate lien amounts more quickly:

- **Plaintiff's Name, Social Security Number, and Date of Birth**
- **Date of Occurrence - Place of Occurrence *in other words* When and Where the Accident Happened**
- **Nature of Injury, *such as* broken ankle, back pain, bad medical care or "malpractice"**
- **Claim/File Number, if applicable**
- **Name & address of each allegedly liable third party *in other words* the person or company you think is responsible for your injuries, their attorney, & their insurance company**
- **Caption & Index Number of the personal injury lawsuit or Insurance Claim Number, if applicable**
- **Copy of the pleadings and Bill of Particulars *in other words* the papers filed by your attorney that say what happened. The "bill of particulars" is a legal document that tells the court all your injuries and dates of treatment.**

HOW TO MAIL CERTAIN DSS DOCUMENTS

SUBPOENAS/SERVICE OF PROCESS	MOTIONS	OTHER LIEN ISSUES
HRA/Office of Legal Affairs Service Desk 4 World Trade Center 150 Greenwich Street – 38th Floor New York, NY 10007	HRA/Office of Legal Affairs Liens and Recovery Litigation Unit 4 World Trade Center 150 Greenwich Street – 38th Floor New York, NY 10007	375 Pearl Street, 21st Floor New York, NY 10038 or ***email:*** liensrecovery@hra.nyc.gov

HOW TO PAY DSS:

For timely crediting of the client's account mail all payments to the DSS lock box:

New York City Human Resources Administration
Division of Liens and Recovery
P.O. Box 414799
Boston, MA 02241-4799

The Division of Liens and Recovery **cannot** accept or endorse two-party checks for deposit.

Do you have a medical or mental health condition or disability? Does this condition make it hard for you to understand this notice or to do what this notice is asking? Does this condition make it hard for you to get other services at HRA? **We can help you.** Call us at 212-331-4640. You can also ask for help when you visit an HRA office. You have a right to ask for this kind of help under the law.

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Trust accounting and banking solutions for law firms. It is designed with attorney insights - for lawyers, by lawyers - and is a no-cost, cloud-based platform for those managing solo and small law firms.

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